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No. 07-1567

FILED
JUL 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a Minor, et al.,

Petitioners/Appellees,

v.

MARTY EUVERARD, DALE SCHNEITMAN, AND CRAIG KISABETH,

Respondents/Appellants.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari raises a question on which there is genuine conflict for resolution by this Honorable Court as required by Supreme Court Rule 10? Does this case present a genuine conflict when it cannot be said with confidence that two courts have decided the same legal issue in opposite ways based on holdings in different cases with very similar facts?

2. Did the panel majority appropriately apply both the "public concern" test and *Connick v. Myers,* 461 U.S. 138 (1983) to the school case pending before it? Does either *Tinker v. Des Moines Independent School District* or *Morse v. Frederick* require a holding other than as rendered by the Panel in this case?

3. Whether the dismissal from the high school football team is an adverse action so as to violate 42 U.S.C. § 1983 where the student athletes exhibited actions inconsistent with the discipline necessary for inclusion on the football team?

4. Must the petition be denied because there is no requirement in the First Amendment that a brawl or other substantial disruption occur prior to constitutionally acceptable restraint on students' speech? Whether the petitioners' assertion that there is a conflict among circuits regarding the need for disruption is misplaced under the facts of this case?

5. Whether the coaches' activities were clearly established as a violation of the student athletes' rights in October 10, 2005?

PARTIES TO THE PROCEEDINGS

1. The petitioners are students of Jefferson County High School who were involved in the football program of the school, specifically Derrick (Rabbit) Lowery, Randy Giles, Joseph Dooley, Dillon Spurlock and their parents. The petitioners will be referred to in this Opposition Response, collectively, as the "petitioners" or "student athletes".

2. The individual Respondents are Marty Euverard, Dale Schneitman, and Craig Kisabeth, respectively the Head Coach, Principal and Athletic Director of Jefferson County High School.

3. The remaining respondent is Jefferson County Board of Education, the governmental entity responsible for the management and operation of the Jefferson County High School.

All respondents will be collectively referenced in this Opposition Response as "respondents".

STATEMENT REGARDING PARENT/SUBSIDIARY STATUS

Pursuant to Supreme Court Rules 24.1(b) and 29.6, respondents Marty Euverard, Dale Schneitman and Craig Kisabeth are individuals.

Respondent Jefferson County Board of Education is a governmental entity and is, therefore, not a nongovernmental corporation with parent or subsidiary status.

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STATEMENT OF ADDITIONAL CONTROLLING CASE FACTS OMITTED FROM PETITION FOR WRIT OF CERTIORARI

Petitioners' case focuses entirely on the written document identified as a petition that had as its heading "I hate Coach Euvard (sic) and I don't want to play for him". Petitioners assert that this document was the basis for the student athletes' dismissal from the Jefferson County High School football team. [Petition for Certiorari, p. 8][1] Neither the student athletes nor their parents mention the student athletes' own actions when the football coaches were trying to understand the impact that this petition would have on the school's football program.[2] Petitioners are so intent to assert their constitutionally protected First Amendment right to free speech that they ignore the affect that the students' ***subsequent*** disobedience, defiance and rank insubordination had

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[1] When referencing the case at bar, *Lowery v. Euverard*, Sixth Circuit Court of Appeals No. 06-6172, filed August 3, 2007, petition for certiorari pending, No. 07-1567, the case will be identified as *Lowery*.

[2] Petitioners' only concession to the fact that there were actions other than the petition that may have been involved in the expulsion of the student athletes from the football team is a statement at page 8 of their petition that "There is a factual dispute as to the basis for the dismissal of these three students . . . " Respondents submit that there is no "factual dispute" when the scenario is viewed in its entirety.

on the high school football program, team and individual players.[3]

Jefferson County High School football player Brett Denton testified that there were many players who had signed the petition but who remained on the team, for both the 2005 and 2006 seasons. [Denton, T.R. Vol. II, pp. 127/22-128/5, Apx. 686-687] Thus, the presence of a player's signature on the petition was not the ticket to expulsion from the Jefferson County High School football team in October 2005. In spite of the so-called petition, if the players confirmed to Coach Euverard that they wanted to play football for him, they remained on the team. [Euverard, T.R. Vol. II, p. 163/15-20, Apx. 697, pp. 171/14-172/17, Apx. 705-706] There is no evidence that the petitioner student athletes would not also have had the same option to remain on the team. However, they exhibited insubordination and disobedience toward the coaching staff **subsequent** to the students' actions in signing the petition.

Rather, student athletes Lowery, Giles and Dooley refused to comply with direct instructions of the coaching staff while Head Coach Euverard was

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[3] The incident subject of this petition for certiorari is related to a second lawsuit styled *Jeff Lowery, et al. v. Jefferson County Board of Educ, et al.*, a case tried in the Eastern District of Tennessee to a jury verdict for defendants, affirmed by the trial court with an attorneys' fee award to defendants, now in the initial stages of appeal to the Sixth Circuit Court of Appeals at No. 07-6324.

meeting with the individual players about the petition and the players' intent to play football under his direction. Students in the locker room on October 10, 2005, testified that they knew there would be repercussions to Lowery, Giles and Dooley based on their confrontational attitude and refusal to comply with Coach Pippenger's request to come outside to speak privately. Specifically, Assistant Coach Pippenger asked petitioner Lowery three times to "Come here, please" but Lowery refused to comply. [J. Giles, T.R. Vol. I, pp. 83/11-84/5, Apx. 598-599; Lowery, T.R. Vol. II, p. 82/8-17, Apx. 652] Lowery even said "Don't put your hands on me" [J. Giles, T.R. Vol. I, p. 84/17-19, Apx. 599; Lowery, T.R. Vol. II, p. 83/7-17, Apx. 653] even though student athlete Giles said it is not unusual for football coaches to touch football players at any time. [J. Giles, T.R. Vol. I, p. 85/13-16, Apx. 600]

At this point, student athletes Giles and Dooley got up to stand in solidarity with Lowery [Lowery, T.R. Vol. II, p. 84/7-24, Apx. 654] even though this action was, in itself, also directly disobeying the Coach's instruction to remain seated and quiet while the individual player interviews were conducted. [J. Giles, T.R. Vol. I, p. 86/8-10, Apx. 601] The players observing this disrespect, combativeness and impudence toward Coach Pippenger recognized that the student athletes' actions were incompatible with the

discipline necessary for a team sport such as football.[4] [Denton, T.R. Vol. I, pp. 126/10-127/5, Apx. 685-686; Manis, T.R. Vol. II, pp. 200/13-201/17, Apx. 717-718]

The student athletes continued their abject defiance by refusing to meet with Coach Euverard in the way he directed and which was the same way all the other players had met with him, individually. Rather, they refused to come individually, saying in essence that the coach would have to take all three of them or none of them. These actions are omitted from the petition for writ of certiorari, even though the testimony of the players sitting in the locker room was that there would be significant consequence to Lowery, Giles and Dooley, not because of their involvement with the petition, but because of how they were acting in the locker room, i.e., insubordination, combativeness and disrespect. [Denton, T.R. Vol. II,

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[4] The Panel did not address Dillon Spurlock's first amendment claim in recognition of the fact that **Spurlock voluntarily quit the team** by his individual affirmation that he did not want to play football for the head coach of the team, Coach Euverard. [Spurlock, T.R. Vol. I, pp. 26/11-27/10, Apx. 562-563; p. 33/13-19, Apx. 569] Coach Euverard testified that he **believed Dillon's statement to be an intention to quit the team**, [Euverard, T.R. Vol. II, pp. 168/22-169/8, Apx. 702-703; p. 184/16-25, Apx. 710] an understanding echoed by Coach Brimer [Brimer, T.R. Vol. II, p. 67/7-8, Apx. 643] and **uncorrected by Dillon himself** at any time after the incident up through and into this litigation. [Spurlock, T.R. Vol. I, p. 45/6-25, Apx. 574; pp. 31/25-32/3, Apx. 567-568] The focus of this Opposition Response is, therefore, on the claims of Giles, Lowery and Dooley, the other three petitioner student athletes.

pp. 112/15-113/1, Apx. 676-677, p. 124/8-12, Apx. 683; Lowery, T.R. Vol. II, pp. 93/22-94/18, Apx. 661-662]

Coach Euverard testified that none of the student athletes were dismissed from the football team for creating, circulating or signing the petition, i.e., for exercising their First Amendment right to free speech. [Euverard, T.R. Vol. II, pp. 162/21-163/14, Apx. 696-697; p. 170/16-18, Apx. 704] Rather, Spurlock quit the team voluntarily and Dooley, Giles, and Lowery were dismissed from the team for insubordination; specifically, for not doing what he directed them to do, for their defiance and confrontation with Coach Pippenger, and, in Dooley's case, for yelling at the rest of the team as they left the locker room. [Euverard, T.R. Vol. II, p. 163/21-25, Apx. 697; p. 189/9-16, Apx. 713]

Football player Brett Denton testified consistent with testimony of the Jefferson County High School football coaching staff that Lowery, Dooley and Giles' actions substantially and materially affected the football program at Jefferson County High School by destroying team unity. [Denton, T.R. Vol. I, pp. 126/10-127/5, Apx. 685-686] Denton continued to say that the team cannot function when some of the players like the coach and some are working against him. [Denton, T.R. Vol. II, p. 127/9-12, Apx. 686]

Football player Michael Manis confirmed in his testimony that the disrespectful attitude exhibited by these players cannot be tolerated by a football coach. Conduct such as exhibited by the student athletes

substantially and materially interferes with the football team and its program because it shows disrespect for the coach, players and teammates. [Manis, T.R. Vol. II, pp. 200/13-201/17, Apx. 717-718]

Coach Euverard testified about the importance of football and coaching as it is interwoven with the educational mission of the school by stating that coaching is important because it teaches student athletes responsibility, leadership, and life skills that will assist them in future years, not just on the athletic field. [Euverard, T.R. Vol. II, p. 162/12-20, Apx. 696] Insubordination cannot be tolerated on a football team where everyone has to be following the same authority figure for the football team to succeed. [Euverard, T.R. Vol. II, p. 167/6-9, Apx. 701]

Coach Brimer stated that if a player is insubordinate or refuses to obey a direct instruction from the coach, this destroys team unity. Insubordination that is permitted without consequence results in the coach being unable to be a leader with the corresponding result that the team has no effective direction. [Brimer, T.R. Vol. II, p. 63/6-15, Apx. 640][5]

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[5] Petitioners repeatedly disparage the panel majority for its reference to materials other than stare decisis precedent, such as the movie *Hoosiers* and news articles about players and coaches on various professional athletic teams, as if the role of high school coach Euverard should be considered in a vacuum. The panel's reference to these incidents simply recognizes the reality that discipline, or the lack thereof, for athletic teams, in

(Continued on following page)

This Honorable Court noted in *Veronia School District v. Acton*, 515 U.S. 646, 654-657 (1995) (internal citations omitted):

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities act *in loco parentis,*" with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school. . . . By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Respondents submit that the panel majority correctly identified the question to be answered in this case at page 6 of the opinion:

> This case is not primarily about Petitioners' right to express their opinions, but **rather**

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or outside the academic setting, has consequences to the team as a whole as well as to the individual team members.

> **their alleged right to belong to the Jefferson County football team on their own terms.** The specific question presented by this case is whether Petitioners had a right to remain on the football team after participating in a petition that stated "I hate Coach Euvard [sic] and I don't want to play for him." (Emphasis added)

Rather than being the operative event triggering their dismissal, the only role the petition played in the student athletes' dismissal from the team was that it gave an opportunity for them to demonstrate their disrespect, disobedience and impudence through their subsequent actions in the locker room. The refusal of the student athletes to follow direct orders of Coach Pippenger together with the subsequent refusal to comply with the instructions of Coach Euverard exhibited the insubordination that was the basis for their dismissal from the football team.

The written expression of their hatred in the petition may have prompted the individual player interviews in October 2005; but, in contradistinction to the other players who also signed the document, the only football players who were dismissed from the team were the student athletes who exhibited locker room insubordination. In short, it was their

insubordination that resulted in their expulsion from the football team.[6]

This petition for writ of certiorari does not demand resolution of a federal question of constitutional dimension, notwithstanding petitioners' attempt to characterize it otherwise. The Sixth Circuit majority correctly determined that this case related to the ability of the Coach to discipline student athletes who were insubordinate, insolent and totally unwilling to obey even the mildest of direction from the football coaching staff. The petition for review by this Honorable Court should be denied.

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[6] At the end of the petition for writ of certiorari the petitioners cite to three news reports/articles regarding sexually abusive coaches, etc. Respondents object to the inclusion of this type material in this case inasmuch as there is no evidence or even allegation that such wrongdoing was directed to the petitioners or that this type activity occurred at the Jefferson County High School by any of the coaches in the football program. The inclusion of these inflammatory and prejudicial articles should be ignored where they have no relevance to the events as claimed by the plaintiff petitioners and where the inferences attached to them border on libel as to these respondents.

REASONS FOR DENYING THE PETITION

1. This petition for writ of certiorari does not raise any question on which there is genuine conflict for resolution by this Honorable Court as required by Supreme Court Rule 10. Further, this case does not present a genuine conflict since it cannot be said with confidence that two courts have decided the same legal issue in opposite ways based on holdings in different cases with very similar facts.

This petition for writ of certiorari is governed by the Rules of the Supreme Court, noting that a writ of certiorari is only granted for compelling reasons. Therefore, the guidelines in Supreme Court Rule 10 state the nature of the reasons for which review is mandated.[7] Rule 10(a) states, in part, as follows:

> Supreme Court Rule 10: A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that

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[7] It is significant to note that the petitioners do not cite to Supreme Court Rule 10 in their petition to this Court.

> conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;. . . .

There must be an intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. Rule 10 requires a genuine conflict on an important federal issue. A genuine conflict, as opposed to a conflict in principle, occurs when it can be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts. *Supreme Court Practice,* (Eighth Edition) § 4.4. The petitioners' protestations notwithstanding, the petition fails to provide evidence of a genuine conflict mandating this Court's attention or resolution.

While the petitioners stress the conflict between the student athletes and respondents as well as the conflict between their personal opinions and that of the Sixth Circuit, the conflict referenced in Supreme Court Rule 10 requires **a genuine conflict** on an important federal issue among two different courts of appeals. Respondents submit that there is no court of appeals decision that conflicts with the Sixth Circuit's decision on the same issues, facts, discipline exacted and rationale. Rather, the Sixth Circuit is in line with its sister courts under the facts presented to it in this case.

The Eighth Circuit considered a case in *Wildman v. Marshalltown,* 249 F.3d 768 (8th Cir. 2001) and rendered a decision that is consistent with and incredibly close to the fact scenario in *Lowery*. The plaintiff in *Wildman* was a basketball player on a high school girls' varsity team who wrote and distributed a letter to her teammates critical of the coach and how the team was being handled. The letter was sent to the coach by one of the parents and the school administration met with the plaintiff to discuss her issues with the coach. They told the plaintiff that the letter was disrespectful and demanded that she apologize to her teammates within twenty-four hours of their meeting. The plaintiff was further told that if she did not apologize, she would not be allowed to return to the basketball court, i.e., she would be off the team. She did not apologize and did not play any more that season.

In affirming the actions of the coaches in *Wildman*, the Eighth Circuit specifically acknowledged that there is a right to express opinions while on school premises, but then further acknowledged that this right is not absolute. School officials have the authority to prohibit the public expression that is in opposition to the teaching of civility and sensitivity in the expression of opinions. 249 F.3d at 771. The opinion continues to note that coaches have a legitimate interest in affording the plaintiff's teammates an educational environment conducive to learning team unity and sportsmanship, and an educational environment that is free from disruptions and

distractions that could hurt the cohesiveness of the sports team, which in *Wildman* related to basketball. 249 F.3d at 771. The Eighth Circuit further noted that coaches in an academic setting deserve a certain amount of respect from their student athlete players, perhaps even more than would be required in a non-academic arena. 249 F.3d at 772.

Petitioners have not pointed out a decision of another court of appeals that is in conflict with the Sixth and Eighth Circuit Courts of Appeals where the facts and issues of law are the same but where the decisions are contradictory.

Where there is no genuine conflict, a petition for writ of certiorari seeks nothing more than an advisory opinion, the type of opinion that the Supreme Court is not empowered to render. The judicial power of the Supreme Court does not extend to the determination of abstract questions. *Ashwander, et al. v. Tennessee Valley Authority, et al.*, 297 U.S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699 (1936). The term "cases of actual controversy" connotes a controversy of a justiciable nature, excluding advisory decrees upon hypothetical facts. *Id.*

There being no genuine conflict, Supreme Court Rule 10 is not satisfied and the petitioners' request for a writ of certiorari to the Sixth Circuit must be denied.

2. The panel majority did not misapply both either the "public concern" test or *Connick v. Myers*, 461 U.S. 138 (1983) to the instant case involving school speech. Neither *Tinker v. Des Moines Independent School District* nor *Morse v. Frederick* requires a holding other than as rendered by the Panel in this case.

Petitioners asserted in the appellate court that *Wildman* is wrongfully decided, and thus *Lowery* is wrongly decided, based on their analysis of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Respondents submit to this Honorable Court that the petitioners' disagreement with *Wildman* and *Lowery* does not create a conflict under Rule 10. Respondents further submit, contrary to petitioners' argument, that the panel majority did not wrongly apply *Connick v. Myers,* 461 U.S. 138 (1983) or the "public concern" test to *Lowery*; rather, the panel majority decided *Lowery* based on the requirements of *Tinker* and then further supported its decision by reference to the *analogous rationale* of *Connick*.

> Thus, the petition was not protected by *Tinker,* and Respondents did not violate Petitioners' First Amendment rights by removing them from the football team. Because there was no constitutional violation, it is not the Court's place to approve or disapprove of Euverard's actions.

> This **conclusion is supported by the analogous reasoning** of the Supreme Court in *Connick v. Myers*, 461 U.S. 138 (1983). . . .
>
> [*Lowery,* Majority Opinion, p. 12]

This use of an analogy to support a Court's decision is evidenced and supported by this Court's recent decision *Tenn. Secondary Sch. Ath. Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495-2496 (2007) (emphasis added):

> **Just as** the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, see *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), **so too** can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants. . . . **[H]igh school football is a game. Games have rules.**

In *Lowery,* the panel majority did not apply the *Connick* decision to decide the case before it and the majority did not impose any "public concern" blanket over general student speech jurisprudence. Rather, the panel majority decided the matter using the *Tinker* analysis and then noted, as additional support for its decision, the analogous government employment situation applicable in *Connick*. This Honorable Court did the same thing in the *Brentwood* decision above cited. Clearly, using an analogy as illustration for the validity of the case holding is not error sufficient to require review by writ of certiorari.

Indeed, the majority confirmed the analogous nature of the reference to *Connick* decision in its footnote 5 at page 33a of the petition in this case.

> We respectfully disagree with Judge Gilman's assertion that we are grafting a public-concern requirement onto *Tinker*. Our holding in no way rests on a determination of whether Plaintiffs' speech touched on a matter of public or private concern. *Tinker* cases must be evaluated in the context in which they occur, and for the reasons stated above students who participate in voluntary athletic programs bear some similarities to government employees. We cite to *Connick* for the proposition that it is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior.

This Court in the *Brentwood* decision cited above recognizes that "high school football is a game. Games have rules." Respondents submit that one of those "rules" is that the coach is to be obeyed, even if he is not liked. The *Brentwood* decision relates to athletic associations and not individual players; however, while the fact application is different, the principle is the same. The fundamental rule in high school football, and one of the reasons the program is provided to so many schools in our country, is that it teaches discipline, leadership, civility, respect for oneself and for others, to name only a few of the laudable concepts associated with sports programs of all types. Underpinning the football program is the

bedrock of respect for the coach along with a willingness to implicitly follow his instruction without question. Players who refuse to do so cannot remain as part of the team as their presence disrupts and undermines the ultimate authority of the coach. Notably, respect for the coach is singularly different than liking the coach.

Finally, petitioners have asserted that this Court's decision in *Morse v. Frederick,* 127 S. Ct. 2618 (2007) was violated by the Sixth Circuit Court of Appeals decision in some way. Respondents, however, submit that just as with the multitude of other cases cited by the petitioners, the fact pattern in *Morse* is totally different than that which is at issue in *Lowery* so as to render the *Morse* decision inapposite.

1) The *Morse* speech was related to drug usage, i.e., marijuana, although student said it was just for fun. The *Lowery* petition related to opinion against the head football coach – "I hate Coach Euvard and don't want to play football for him." – speech evidencing the antithesis of civility and respect that is to be taught at the school and, especially, in the athletic program.

2) The *Morse* speech, the sign, was off school property, across the street facing the school. In *Lowery,* the speech, the petition, was in school and on school premises as well as in parking lot, etc. Furthermore, the disobedient, combative and insubordinate "speech" occurred in the locker room, in view of other team members.

3) The *Morse* speech evidenced no disruption of class or school work. In *Lowery,* while the petitioners discount the effect of the petition, respondents provided testimony of the adverse affect the subsequent insubordination had on the football program, undermining the discipline and role of head coach as authority figure.

4) In *Morse,* the student was suspended for five days because of the sign and subsequent refusal to relinquish it. He was then suspended an additional five days because of his protest to the discipline and quoting Thomas Jefferson on free speech. In *Lowery,* the players were dismissed from the football team *not because of the petition* but because of their subsequent **insubordination.**

In short, *Morse* does not require an outcome other than that rendered by the appellate panel inasmuch as its facts render the decision inapposite. The Sixth Circuit did not err in its decision in the *Lowery* matter nor did it err in the rationale it used to achieve its decision. There is no "public speech" connotation to the decision, it did not improperly rely on a governmental employee situation to render its decision, and the decision is not in conflict with either *Tinker* or *Morse.* The petition for writ of certiorari should be denied.

3. The dismissal of the student athletes from the high school football team was not an adverse action so as to violate 42 U.S.C. § 1983 where the student athletes exhibited actions inconsistent with the discipline necessary for inclusion on the football team and where participation in extracurricular activities is not a constitutional right.

The respondents contend that the document at issue, i.e, the petition, should not be granted First Amendment protection status, and the two-judge majority Panel concurred. However, even under Judge Gilman's concurring decision where the petition was given constitutional protection, the outcome remains the same – no violation of a constitutional right occurred and the expulsion from the athletic team was not an adverse action under 42 U.S.C. § 1983 so as to subject the respondents to liability.

The law is clear that a person does not have a liberty interest subject to due process protection to participate in interscholastic athletics. *See Hamilton v. Tennessee Secondary School Athletic Association,* 552 F.2d 681 (6th Cir. 1976); see also *Mitchell v. Louisiana High School Association,* 430 F.2d 1155 (5th Cir. 1970); *Bailey v. Truby,* 321 S.E.2d 302 (W.Va. 1984). Indeed, the two-judge majority in *Lowery* stated:

> It is well-established that students do not have a general constitutional right to participate in extracurricular athletics. See

> *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1999), rev'd on other grounds, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001); *Alerding v. Ohio High School Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004); *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983). As this Court has noted, "[t]he main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992).

Lowery v. Euverard, Sixth Circuit Court of Appeals No. 06-6172 5, filed August 3, 2007, petition for certiorari pending, No. 07-1567.

Even under a *Tinker* analysis the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Bethel School Dist. No. 403,* 478 U.S. 675, 686 (1986). The Supreme Court further stated in *Bethel School Dist.* that "schools must teach by example the shared values of a civilized social order." 478 U.S. at 683. When these "shared values" come in conflict with one another, our society places a high value on independence of thought and frankness of expression but this must be placed in juxtaposition with the equally high value placed on discipline, courtesy and respect for authority, subjects that are especially suited for the

athletic field and the relationship between coach and athlete.

It is clearly established that the constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings," *Id.,* at 682, and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside of the schoolhouse. See *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988).

It is undisputed that schools teach in circumstances other than the academic classroom. One place that is particularly suited to respect, authority and discipline, whether self discipline or respect for the discipline imposed by others, is on the athletic field. Respondents submit that the student athletes were not deprived of their academic education by virtue of their expulsion from the team. Rather, the student athletes exhibited their refusal to be instructed by Coach Euverard and his staff, by their own disregard for the authority of the coaches in the locker room and by their own acts of insubordination separate and totally apart from their involvement with the petition. This is specifically the type of behavior that this Supreme Court has stated a school need not tolerate. *Hazelwood Sch. Dist.,* 484 U.S. at 266. Where the actions of the student athletes completely undermined the respect for the coaches, the remaining team players knew, without anyone telling them, that there would be severe consequences to these student

athletes. Indeed, these players stated that the team unity could not survive if there were not some extreme action taken by the coaches.

There is no constitutional right for these petitioners to play football on a high school team when these students have exhibited a refusal to abide by the directions and instructions issued by the coach. The actions of the respondents were not in violation of any constitutional right of these petitioners and the actions were not of the nature to constitute an adverse action under 42 U.S.C. § 1983.

The petition for writ of certiorari should be denied.

4. The petition should be denied because there is no requirement in the First Amendment that a brawl or other substantial disruption occur prior to constitutionally acceptable restraint on students' speech.

The panel correctly noted that constitutionally acceptable restraint on a student's speech does not require evidence that the school's activities or programs be sidelined before the regulatory action can pass constitutional muster. Specifically, the panel majority decided that it was reasonable, under the facts of this case, for the respondents to believe that the petition would disrupt the football program by eroding the coach's authority and dividing players into opposing camps, noting:

> This belief was bolstered by Petitioners' insubordinate and disruptive acts at the team meeting.
>
> [Opinion at p. 12]

This Court has stated that a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside of the schoolhouse. *Hazelwood Sch. Dist.*, 484 U.S. at 266. Further, even under a *Tinker* analysis, the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Bethel School Dist. No. 403,* 478 U.S. at 686 (1986). Requiring the school program to be halted due to conflict and disruption before granting the school personnel protection from a claim for violation of First Amendment rights effectively holds the school hostage to student will, thereby putting the students in charge of the school system and resulting in a situation that is clearly not constitutionally required. Petitioners' argument does not support this Court granting the petition for writ of certiorari.

Petitioners further assert that there is "strong conflict" among circuits as to whether there is a need for disruption in school speech cases before allowing intrusion into the free speech rights of the students. Respondents submit that this argument is in error as it is applied to the *Lowery* case.

Lowery, Giles and Spurlock were dismissed from the team because of their refusal to obey direct instructions from Coach Pippenger as well as from Coach Euverard. Their combative attitude and actions exhibited toward Coach Pippenger and then continued toward Coach Euverard was conducted in view of many, if not all, of the team players in the locker room. Several players testified as to their expectation that there would be significant consequences to these three players because of their clear defiance of the coaches in the locker room, not in any way related to the petition, its creation or content.

This is what distinguishes *Lowery* from the cases cited by the petitioners. Players who demonstrate abject refusal to obey the coach in front of the rest of the team are putting themselves in a position where the coaching staff has little else it can do to maintain control and respect of the team than to eject those student athletes from the team.

The cases cited by the petitioners do not provide similar facts for comparison with those in *Lowery.* For example, petitioners refer to the 1943 Supreme Court decision in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 16 (1943) at page 25 of the petition. However, this is a decision that relates to refusal to participate in compulsory saluting the flag on religious grounds. Clearly this is inapposite to the *Lowery* situation. Petitioners also reference *Seamons v. Snow,* 206 F.3d 1021 (10th Cir. 2000) in which a high school player was dismissed from an athletic team for refusing to

apologize for the exercise of his free speech rights in his reporting of a hazing incident where he was assaulted in the football team's locker room.

The Eighth Circuit distinguished the facts in *Seamons* from those in *Wildman* where the letter written against the basketball coach constituted insubordinate speech toward the coaches. The *Wildman* court stated that "in an athletic context void of the egregious conduct which spurred the football player's speech about the hazing incident in *Seamons* and where Wildman's speech called for an apology, no basis exists for a claim of a violation of free speech." 249 F.3d at 772. The *Lowery* case, in contrast, is in line with *Wildman* and the *Seamons* facts are inapposite. It is the *Wildman* rationale that the Sixth Circuit majority followed and which is totally consistent and not in conflict with the decisions from sister circuits on the same facts, as required by Rule 10. The *Seamons'* decision simply does not have the same factual predicate as *Lowery* and, thus, is not an appropriate precedent to guide the decision in *Lowery*.

It is respectfully submitted that the First Amendment is not offended by an educator taking action to restrict or discipline student speech that is discourteous and insubordinate to the school faculty or administration, as long as their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood Sch. Dist.*, 484 U.S. at 266 (1988). The Supreme Court has always supported the concept that civility is a legitimate pedagogical concern. This

is part of the educational mission of the school, to teach young people how to function appropriately in the world at large.

Respondents agree that it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and that the school administration and faculty "do not have absolute authority" over their students. *Tinker,*, 393 U.S. at 506. However, school officials also do not need to cower in the corner so as to abdicate their function of maintaining order and control of the public school system by handing it over to the public school student for fear of federal court reprisal. See *Tinker,* 393 U.S. at 526; *Bethel School District No. 403,* 478 U.S. at 686.

The petitioners take issue with the Panel's reference to numerous sporting articles, movies, newspapers, prominent teams and athletes, asserting that this is improper in the judicial decision. Respondents submit that these references are simply the recognition that discipline is required in any type of athletic forum and the high school football team is not exempt from this aspect of sports and athleticism.

The Sixth Circuit properly determined this *Lowery* case and there is no compelling reason for this Court to accept the petition for writ of certiorari.

5. It was not clearly established on October 10, 2005, when the respondents were called upon to address the student petition and the subsequent insubordination of the plaintiffs, that their actions would have been a violation of any of the student athletes' constitutional rights.

Incredibly, the petitioners' final point is that this petition for writ of certiorari should be granted because the right to criticize an abusive school official without disruption was clearly established in October 2005, the time when these respondents were required to address the situation. Respondents assert that the fallacy in this proposition is evident in a brief review of the *Lowery* decision itself. The three judges forming the panel on this case came to a two-to-one split. Two judges held that there was no constitutional violation of free speech rights because the petition was not subject to constitutional protection. One judge held that the speech was constitutionally protected but that this was not clearly established in October 2005 so the respondents were subject to immunity. Hence, all three judges dismissed the claim.

Clearly, if three respected jurists could not agree on whether the speech was constitutionally protected and, if so, whether it was clearly established as such, the coaches of the Jefferson County High School football team could not be expected to know this. The jurists have as much time as they want to consider, read, ponder, discuss and arrive at a conclusion

which, in this case was uniform in result but on different rationales. The coaches, on the other hand, were faced with a petition stating hatred of the head coach. They needed to evaluate the situation before the next game. They called all the team in, conducting player interviews one by one. The decision was made. Allow all the team members who did not sign the petition to remain on the team. Allow all the team members who did sign the petition but recanted and said they would play for the head coach to remain on the team. There is no evidence that this same decision would not have been extended to these petitioners. However, when confronted with the three student athlete petitioners, they were faced with disrespect, disobedience and combativeness, even before the player interviews could begin. The coaches had to react without the benefit of years of judicial training and months of reading, analysis and discussion.

There is dispute among the three Panel members as to, the constitutionality of the petition and subsequent discipline of the student players. The constitutionality of their actions surely cannot be said to have been clearly established under the facts facing these coaches in October 2005.

Based on the cases cited hereinabove, respondents submit that Judge Gilman was correct that there was no basis for these respondents to believe that their actions in dismissing these student athletes from the football team would subject them to liability, especially where the cases had stated that petitions stating harsh criticism or using fowl

language against the coach of a high school athletic team were not constitutionally protected in the first place. Further, based on the facts of this case, where the actions of the student athletes were disobedient and combative toward the coaching staff, separate and apart from the issue of the petition, respondents had no choice but to eject them from the team. Even the team members who watched the interaction between the student petitioners and the coaches expected adverse consequences, separate and apart from the existence of the petition.

CONCLUSION

Respondents submit that the unanimous conclusion of the panel is correct. The speech in issue is not constitutionally protected and, thus, not actionable against these respondents. Further, at the time the respondents were faced with the situation involving the Jefferson County High School football program, it was not clearly established that their actions would potentially subject them to constitutional scrutiny or liability so the extension of qualified immunity is appropriate. Respondents, however, further submit that the majority opinion is not in conflict with precedent of this Supreme Court. The reference to *Connick* was as an analogous and illustrative scenario. The decision as to the instant case was already determined without any "public concern" gloss or requirement. Noting the petitioners' activities in the locker room, the panel majority recognized the reality that

substantial interference with the school football program was going to occur based on the petitioners' attempts to incite team mutiny.

No violation of petitioners' First Amendment rights occurred. The Panel decision was correct. Contrary to petitioners' assertion, there is no genuine conflict that must be resolved pursuant to Supreme Court Rule 10 and there is no issue so critically significant as to require this Court to extend certiorari review to this matter. The petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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